MICHAEL D. SCHRUNK, District Attorney for Multnomah County
600 County Courthouse • Portland, Oregon 97204 • (503) 248-3162 • FAX (503) 248-3643

February 6, 1997

J. Todd Foster
Staff Writer
The Oregonian
1320 SW Broadway
Portland, OR 97201

Susan G. Bischoff, Esq.
Senior Assistant City Attorney
City Attorney's Office
1333 NW Eastman Parkway
Gresham, OR 97030-3825

Re: (1) Petition of J. Todd Foster, for The Oregonian, dated November 6, 1996 to disclose certain records of the City of Gresham; and
(2) Petition of J. Todd Foster, for The Oregonian, dated December 2, 1996 to disclose certain records of the City of Gresham
(Petitions consolidated for decision)

Dear Mr. Foster and Counselor Bischoff:

On these public records petitions, ORS 192.410 et seq., now consolidated for decision, petitioner J. Todd Foster, for The Oregonian newspaper, requests the District Attorney to order the City of Gresham to disclose (1) records of the city relating to certain investigations of alleged misconduct by former Gresham police Sergeant James Kalbasky, who was initially terminated from his employment on May 24, 1996, including records generated by a labor arbitration proceeding which resulted in a written settlement agreement (without arbitral hearing or award) reinstating Officer Kalbasky as a regular police officer as of November 8, 1996 (Petition of November 6, 1996, supra);[1] and (2) ...[A]ll records pertaining to police employees who have gone to arbitration since 1994" (Petition of December 2, 1996). The city's response to the second petition (of December 2) clarifies that there are three other Gresham police employee arbitration proceedings (in addition to Officer Kalbasky's) during the relevant period of 1994-1996, namely, the arbitration cases of Maggie Dorsey, Richard Riveria and Robert

[1]The Oregonian has sought the Kalbasky investigations materials on two prior public records petitions, Petition of Courtenay Thompson (4/15/96) and of J. Todd Foster (6/24/96), both denied with leave to renew because the investigations or discipline action were not yet concluded.

Galbreath (as discussed below).

Because these consolidated petitions involve several cases of "discipline action" proceedings, ORS 192.501(12), and because this office has not previously significantly addressed the standards which should govern petitions under the public records law seeking disclosure of "discipline action" records, we have decided to consolidate both of these petitions and by this letter decision provide guidance respecting how this office should resolve these and similar personnel discipline disclosure issues in future cases.

1. The exemption for "discipline action materials," ORS 192.501(12): adoption of guiding principles for this office's review of petitions under that exemption.

Respecting all but one of the four disciplinary cases referenced by these petitions, the City of Gresham has claimed that the records are exempt from disclosure under ORS 192.501(12), which provides:[2]

> "The following public records are exempt from disclosure under ORS 192.410 to 192.505 [the public records law] unless the public interest requires disclosure in the particular instance: ***(12) A personnel discipline action, or materials or documents supporting that action;...."

As we have observed on past public records letter decisions, the Oregon appellate courts have furnished very little guidance concerning how the "public interest" in the disclosure of records relating to public employee discipline is to be weighed where discipline actually has been imposed. The Oregon Supreme Court has determined that this exemption has no application when a personnel discipline action is concluded and no discipline has been imposed, City of Portland v. Rice, 308 Or 118, 775 P2d 1371 (1989), but that case offered only one footnote observation which provided any clue respecting how the balance is to be struck where discipline has been imposed: "The policy intended by the legislature, which we enforce, protects the public employee from ridicule for having been disciplined but does not shield the government from public efforts to obtain knowledge about its processes." Ibid., 308 Or at 124, note 5. This may be only dictum, since the court concluded the exemption simply did not apply.[3]

---

[2]In the one exceptional case of police detective Robert Galbreath the employee was reinstated by an arbitral award which held that the city had not met its burden of proof to show just cause for termination; and the city has conceded that under the ruling of City of Portland v. Rice, 308 Or 118, 775 P2d 1371 (1989), that outcome made the discipline action materials exemption inapplicable, since ultimately no discipline was imposed. The city already has released the Galbreath materials to petitioner, excepting only those which the city considered "privileged," and petitioner Foster has indicated that he is satisfied with the disclosure made and thus the Galbreath portion of his second petition is moot.

[3]Equally dictum, but helpful to shed light on the motivation behind the "discipline action exemption," is this passage from the prior lower appellate court opinion in Rice (which also found the exemption to be inapplicable when no discipline has been imposed):

In the only case which has significantly discussed this exemption where the exemption was applicable (or at least was assumed to be so), Oregonian Publishing Co. v. Portland School District No. 1J, 144 Or App 180, ___ P2d ___ (October 16, 1996), appellant school district's petition for reconsideration filed, October 25, 1996, the Court of Appeals reviewed and affirmed a trial court order in a public records law action which commanded disclosure of an investigative report prepared by the Portland School District Police concerning the apparent misuse and theft of school district property by a principal and vice-principal. After the investigation was concluded, it was determined that no criminal prosecution would be sought and the "personnel investigation report" thus prepared was filed in the personnel file of the principal and vice-principal, both having resigned from employment consequential to the investigation. Among other exemptions from disclosure claimed by the school district it claimed that this investigative report was exempt under the discipline action materials exemption. The appellate court affirmed the order for disclosure with limited discussion that adds at least some gloss to the single cryptic footnote of City of Portland v. Rice:

> "The district argues in the alternative that the requested records are qualifiedly exempt under ORS 192.501(12). ORS 192.501(12) provides that records relating to a 'personnel discipline action' are exempt from disclosure unless the public interest requires disclosure in the particular instance. Assuming, without deciding, that the records at issue are records relating to a personnel discipline action, we must then balance the private interest in confidentiality against the public interest in disclosure. We have stated that 'the Public Records [inspection law] expresses the legislature's view that members of the public are entitled to

---

[FOOTNOTE 3 - Cont'd.]
"The 'personnel discipline action' exemption proposed in Senate Bill 704, was added to Oregon's Public Records Law in 1985. Or Laws 1985, ch 813, section 1. Public disclosure of personnel discipline records was originally raised by a union representing public employes. The union was concerned that the public records law was undercutting collectively bargained procedures that required public employers to remove a written reprimand from an employe's personnel file if it were subsequently reversed or reduced to an oral reprimand as a result of a grievance or arbitration proceeding. Tape recording, Senate Labor Committee, April 21, 1985, Side B at 217. In later proceedings on the proposed legislation the bill was amended to also exempt personnel discipline actions from disclosure under the Public Records Law.

"Or Laws 1985, ch 813, section 2, was codified as ORS 240.750, which provides:

> 'No copy of a personnel discipline action that has been communicated orally or in writing to the employe and subsequently reduced in severity or eliminated through collective bargaining, grievance or personnel process shall be placed or otherwise retained in the personnel file of the employe unless agreed to by the employer and the employe.'

"That statute and the 'personnel discipline action' exemption were apparently intended to protect employes from having their records of discipline actions exposed to public inspection.***" City of Portland v. Rice, 94 Or App 292, 296, 765 P2d 228 (1988).

> information that will facilitate their understanding of how public business is conducted.' Guard Publishing Company [v. Lane County School District], 96 Or App [463] at 469 [774 P2d 494 (1989), reversed on other grounds, 310 Or 32, 791 P2d 854 (1990)]. We also have said that 'disclosure decisions should be based on balancing those public interests that favor disclosure of governmental records against those public interests that favor governmental confidentiality, with the presumption always being in favor of disclosure.' Turner v. Reed, 22 Or App 177, 187, 538 P2d 373, rev den (1975).
>
> "The public interest in this case is significant and requires disclosure. The records at issue involve misuse and theft of public property by public employees. That is a matter of legitimate public interest. Furthermore, considering the publicity that this matter already has received, it is not clear that disclosure of the document will intrude into any privacy that [principal] Parr or [vice-principal] Williams enjoy with respect to it. Therefore, the documents are not exempt under ORS 192.501(12)." Oregonian v. Portland Sch. Dist. no. 1J, supra, 144 Or App at 187.

Perplexity respecting how to administer the discipline action materials exemption arises from the fact that the general thrust of Oregon's public records law favors open disclosure, ORS 192.420 (presumption of right to inspect and copy any records of a public body in Oregon), ORS 192.450(1), 192.490(1) (burden of justifying non-disclosure always rests upon the public body); and the original enactment of the present public records law in 1973, Oregon Laws 1973, Chapter 794, contained no discipline action materials exemption. Indeed, prior to the enactment of the discipline action materials exemption in 1985, Oregon Laws 1985, Chapter 813, Section 1, Oregon case law had determined that records reflecting misconduct by public employees were per se material required to be disclosed, e.g., Turner v. Reed, 22 Or App 177, at 193, 538 P2d 373 (1975):

> "***We now hold that another category [of records] is per se available for public inspection, specifically those public records where the only interest in confidentiality is to protect public officials from criticism of the manner in which they have discharged their public duties. Citizens are entitled to inspect public records to learn what their government is doing -- this means learning of government's possible shortcomings, not just government's successes."

See also, Jensen v. Schiffman, 24 Or App 11, at 17, 544 P2d 1048 (1976) ("...any privacy rights that public officials have as to the performance of their public duties must generally be subordinated to the right of the citizens to monitor what elected and appointed officials are doing on the job," ordering disclosure of a District Attorney and Sheriff investigation of misconduct by certain police officers of the City of Reedsport). That prior case law had the virtue of establishing something like a "bright line" rule, relatively easy to apply.

Thus, the enactment of the discipline action materials exemption in 1985 moved in the other direction, creating tension between the primary thrust of the public records law favoring disclosure and this exemption's grant of a qualified exemption from disclosure of "discipline" case materials, which necessarily involve information about misconduct, or alleged misconduct, of government employees. Accordingly, because we are faced presently with deciding upon the disclosure of three different employee discipline proceedings and reasonably anticipate that more petitions of this kind will be filed, we have given consideration to what standards or principles should now and hereafter govern this office's review of such petitions seeking disclosure of disciplinary records, subject to such further instruction as future judicial precedents or legislation may provide.

At the outset, we must state that no all-comprehensive standard governing disclosure of public employee discipline records is practicable. The nature of disciplinary violations varies greatly and the relation of any given employee discipline case to the "public interest" depends upon the particular circumstances, so that case-by-case analysis always will be required to some extent. We believe that the fundamental underlying principle at the very core of the public records law is that the public has the right to know how government's mission is being achieved (or is failing to be achieved). Keeping that primary consideration in mind, we adopt the following general guiding principles for our future (and present) decisions upon public records petitions relating to discipline of government employees.

Guiding principles for disclosure of discipline case records under the public records law (ORS 192.501(12))

1. Serious misconduct by a government employee should be disclosed in the public interest; relatively minor misconduct need not be disclosed if the public interest would not be significantly promoted by doing so.

2. Generally, termination from employment or other discipline for cause is serious misconduct if it is based upon corruption in the discharge of the public's business (including theft of the public's property), abuse of official power by employing such power for a purpose not properly related to any lawful government objective or by use of illegal or impermissible means in the pursuit of a governmental objective, misconduct which impairs or imperils the mission of the government agency, or criminal behavior (particularly when job-related) which constitutes proper ground for discharge from employment or other discipline.

3. Discipline for acts or faults of government employees falling short of the preceding kinds of serious misconduct may also be determined to require disclosure if the cumulation of repeated disciplinary violations fairly raises the issue whether continued employment of the particular employee in itself constitutes an imprudent or improper management decision not to impose more severe sanctions or termination of employment.

4. Discipline cases that evidence systematic misconduct, i.e., misconduct affecting

multiple employees and involving similar improper acts or omissions may require disclosure even when the acts or faults in question do not individually rise to the level of the serious misconduct described in points 1 and 2, where the overall pattern of disciplinary violations indicates there may be a concentrated personnel problem in a particular agency or part of any agency, or sheds light on the effectiveness of management's efforts to properly control the behavior in question.

5. Other cases of disciplinary records may merit disclosure in the public interest even though the conduct of the disciplined employee is not serious misconduct as previously described, where circumstances raise an issue of unduly harsh (or unduly lenient), arbitrary, irrational or discriminatory administration of discipline by management and thus illuminate management's conduct of the public business.

6. Finally, public employees should not be subjected to public disclosure of disciplinary violations not of the kind specified in the preceding guiding principles, when such disclosure would merely subject the employee to added humiliation and would not significantly promote the public's understanding of the manner in which the programs and services of government are being carried out. Part of the purpose of employee discipline is to encourage the employee's morale while correcting undesirable conduct, which goal is not promoted, as we think, by a process of indiscriminate public pillory -- and which consideration presumably was part of the Legislative Assembly's motivation for the enactment of the "discipline action" exemption in the first place.

Together with this statement of the principles by which this office will be guided on public records petitions relating to discipline records, it is appropriate to remind public agencies that this office does not act as the legal counsel or legal advisor to other public agencies on public records disclosure issues.[4] Accordingly, this office generally will not independently raise some ground of exemption for material which has not been specifically claimed by the government agency which is the custodian of the records in question. If, for example, the only claim of exemption respecting records compiled in a discipline inquiry is made under the discipline action materials exemption, ORS 192.501(12), this office, pursuant to the above-stated guiding principles, generally will simply order disclosure of the records if the misconduct proven is of the serious kind that comes within the principles previously stated. If a particular government agency thinks that there is any other public records law exemption which applies to the records in whole, or in part, it is the burden of the public agency to specifically call our attention to any other claimed exemption and to the particular portion of the records affected by that claim. The agency may need to consider, for example, whether there are any third-party personal privacy issues, confidential informant issues (where information of employee

[4]The District Attorney's role under the public records law is similar to that of an impartial quasi-judicial hearings officer, and not that of a legal counsel. ORS 192.450, 192.460. Local governments may, of course, obtain legal advice from their own city attorney, county counsel or legal counsel. (This is not to discourage informal inquiries about the application of the public records law, to which this office will gladly respond).

misconduct was confidentially provided), etc, etc.

2. Disciplinary case of Officer (formerly sergeant)James Kalbasky; ORS 192.501(12) (discipline action materials exemption); and ORS 30.402 (regulating confidentiality of litigation settlement agreements).

2 (a). The relevance of ORS 30.402.

Officer Kalbasky's case involved two 1996 internal affairs investigations, Gresham Police Department Internal Affairs Investigations No. 96-04 and 96-108. As stated above, Officer Kalbasky was initially terminated from employment in May, 1996 (then serving as a sergeant), and ultimately reinstated as a regular police officer by a written settlement agreement dated November 5, 1996, reinstatement effective November 8, 1996. Notwithstanding the discipline action materials exemption, ORS 192.501(12), petitioner Foster contends that the written settlement agreement itself should not be confidential because ORS 30.402, as enacted by Oregon Laws 1991, Chapter 847, Section 1, establishes a legislative policy disfavoring the confidentiality of settlements of tort claims against a public body or its officers, employees or agents. See, copy of ORS 30.402 (attached Exhibit 1).

The city counters that the anti-secrecy policy of ORS 30.402 by its express terms is limited to actually filed state tort claims court cases under ORS 30.260 to 30.300 (the state tort claims act), and no state tort claim action occurred in Kalbasky's disciplinary case. The labor arbitration proceeding was settled by written agreement which includes terms requiring confidentiality. However, no tort claim action, as such, ever was filed in state court. Kalbasky did file a federal court action against the city of Gresham, civil no. 96-532-JO (US District Court, District of Oregon). The federal court case was voluntarily dismissed by agreement of the parties as part of the general settlement of the labor arbitration grievance.

We must conclude that the city is correct that ORS 30.402 is specifically limited to the "settlement or compromise" of "...an action under ORS 30.260 to 30.300..."(emphasis added) which action has been commenced "...as provided in ORCP 3...." ORS 30.402(1) and (4). These limiting terms apparently exclude direct application of this statute to a federal court case, or to the settlement of a claim which has not yet become a formal state court "action," "...by filing a complaint with the clerk of the [state] court," Oregon Rule of Civil Procedure (ORCP) 3.

Nevertheless, we have to consider whether the legislative policy embodied in ORS 30.402 that "No public body, or officer, employee or agent of a public body...shall enter into any settlement or compromise of the action if the settlement or compromise requires that the terms of the settlement or compromise be confidential," ORS 30.402(1), properly should be given some weight as relevant analogous legislative policy when reviewing a public records petition relating to a written settlement agreement where no state court action ever was filed. In search of guidance on this point, we have reviewed the legislative minutes of the House and Senate

Judiciary committees (and subcommittees) which deliberated on House Bill 3222 (1991), enacted as Oregon Laws 1991, Chapter 847, Section 1 (ORS 30.402). See, State Archivist's Listing of Legislative Records re: HB 3222 (1991) (Exhibit 2 attached).

However, we derive little guidance from these legislative minutes. They do reflect a recognition by the legislators that this statute would only apply to litigated claims, i.e., claims actually filed as a court action. Unfortunately, however, there is no determinative discussion (at least in the minutes) regarding what collateral relevance the legislators considered this legislation might have for the disclosure of non-court action settlements. Several representatives of the news media testified before the sub-committee on Civil Law and Judicial Administration of the House Committee on Judiciary. Judson Randall, then assistant to the editor of The Oregonian, noted that the City of Portland had been "fairly forthright" in making claims settlements public, but some "surrounding communities," specifically including the city of Gresham, had attempted to keep such settlements undisclosed. Ibid., Minutes of May 9, 1991, at pp. 5-6. Representative Del Parks, a non-member testifying before the subcommittee, would have preferred that the bill include all claims, whether filed in court or not. Ibid., at p. 2. On the other hand, representatives of local governments, such as the League of Oregon Cities, opposed the bill. Ibid., at pp. 7-8. Daryl Garrettsen, assistant legal counsel of Marion County, opposed the bill on the grounds that it would cause additional expense and changes in personnel policy, noting that "Terminations are routinely settled by allowing the employee to resign, purging the personnel file, and basically agreeing to a neutral letter of recommendation that the employee worked here from x date to y date." Ibid., at p. 9.

Four days later, at the subcommittee's work session to consider amendments to the bill, subcommittee Representative Jim Edmunson noted that "Originally the bill dealt with actions. An action consistent to ORCP 3 means a complaint has been filed. The inclusion of any resolution of disputes where no action has been commenced goes beyond the scope of the Parks Amendment. The bill is silent on those other instances." Minutes, Subcommittee on Civil Law and Judicial Administration, House Committee on Judiciary, May 13, 1991, at p. 2. During the same session there was some reference to how the public records law might apply to settlement agreements, but this subject apparently was not pursued. Ibid., at p. 3 (exchange between subcommittee member Representative Kelly Clark and committee counsel Greg Chaimov). The bill, as amended, was voted out to the full Judiciary committee with a "do pass" recommendation, 7 - 1. Ibid., at p. 5. The minutes reflect no substantive discussion of the bill when the full House Judiciary Committee passed the measure out to the floor. Minutes, May 21, 1991, at p. 2. Likewise, the minutes of the Senate Judiciary Committee reflect no significant discussion that is helpful on the present issues. Minutes, Senate Committee on Judiciary, June 10, 1991.[5]

---

[5]Should either party to this petition desire a copy of it, the full minutes as received from the State Archivist can be provided on request.

As previously noted, the written settlement agreement expressly provides that its terms will be confidential and specifically refers to the public records law exemption for discipline action materials, ORS 192.501(12). But the text of the public records law contains no exemption or provision specifically favoring the confidentiality of settlement agreements, as such; and the enactment of ORS 30.402, by clearly disapproving the confidentiality of government litigational settlement agreements (except when authorized by the court after making the special findings required by ORS 30.402(2)), implies that the Legislative Assembly generally favors the disclosure of such settlements or, at least, continues to see no need to give them the added protection of a specific public records law provision. Thus, we conclude that ORS 30.402 does not by its own terms prohibit the confidentiality clause in this settlement agreement (because no state court tort claim action was involved); but also that the public records law accords no distinct weight to the fact that the government agrees to confidentiality in settling a disciplinary matter apart from the existing public records law exemptions, such as the discipline action materials exemption asserted here, ORS 192.501(12). If special weight is to be given to the agreement for confidentiality the Legislative Assembly's approval by amendatory legislation would appear to be necessary.[6]

---

[6]On a prior public records petition letter order dated August 21, 1989 (Petitions of Kathleen Glanville for The Oregonian and Mark Garber for Gresham Outlook) (prior to the enactment of ORS 30.402) this office ordered disclosure of a severance agreement which terminated the service of an employee of the City of Gresham and which also, like the present settlement agreement, required confidentiality. This office then considered and rejected the possibility that confidentiality clauses in such settlement agreements should be entitled to independent weight under the public records law, because we found no clearly-established legal basis for that, although we recognized that such settlements can be in the public interest by bringing closure to a personnel issue without expensive litigation, that the "confidentiality" clause might be an important inducement to encourage the settlement, and that these considerations had produced some emerging authority in support of something like a privilege protecting such settlements:

> "We have also considered whether there possibly could be an alternative basis for exemption from disclosure of a severance agreement which contains a confidentiality clause based upon the theory that a specific 'settlement negotiation' privilege is recognized in the law. If such a privilege existed it might justify non-disclosure under the provision of the public records law which exempts 'public records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law.' ORS 192.502(8). Apparently, there are at least a few trial court-level federal court decisions under the federal Freedom of Information Act (FOIA) which may presage the eventual recognition of such a privilege. See, Franklin and Bouchard, Guidebook to the Freedom of Information and Privacy Acts (1989), Section 1.08[1], at p. 1-189 ('Thus, the law with respect to settlement documents is currently in a state of flux....***The adverse decisions in this area...have failed to take cognizance of the relatively recent development of a distinct 'settlement negotiation' privilege. See, e.g., Olin Corporation v. Insurance Company of North America, 603 F. Supp. 445, 449-50 (S.D.N.Y. 1985); Bottaro v. Hatton Associates, 96 F.R.D. 158, 159-60 (E.D.N.Y. 1982).' So far, however, the federal appellate courts seem not to have sanctioned recognition of such a new and distinct privilege see, County of Madison, N.Y. v. U.S. Department of Justice, 641 F2d 1036, 1042 (1st Cir., 1981) (District Court's recognition of a separate "settlement negotiation" privilege as ground for denying disclosure under FOIA Exemption 5 (5 USC 552(b)(5)) reversed on appeal).
>
> "Oregon certainly does have various legal provisions which recognize that settlement negotiations are

2(b). Application of ORS 192.501(12) to Kalbasky's case.

In discussing public records disclosure issues in general, and these kinds of disciplinary cases in particular, we are handicapped by the requirement that this office cannot properly disclose the contents of the records disclosure of which is under review -- a limitation applicable to reviewing courts as well, excepting only the Supreme Court of Oregon, which has the last word.[7]

However, in Officer Kalbasky's case, unlike the two following cases discussed below, there has been substantial news media disclosure of various aspects of the events which led to the officer's termination and reinstatement. For present purposes, we consider it sufficient to say that the two internal affairs investigations related to the officer's association and conduct with two different women while on or off duty in the years 1995 (No. 96-04) and 1991 (No. 96-108). We have reviewed all of these materials which include interviews with several witnesses, the women in question, and Officer Kalbasky himself. Although the officer was reinstated as a regular police officer the practical effect of the settlement was to reinstate him at a lower level of pay and subject to various conditions. Thus, the ultimate disposition still involved the imposition of a significant disciplinary sanction. We conclude that the conduct in question, viewed in its totality, did constitute serious misconduct which impaired or imperiled the proper implementation of the relevant government agency's mission, namely, the Gresham Police Department. Accordingly, we will order disclosure of the entirety of the records of internal affairs investigations 96-04 and 96-108, including all documents relevant to the labor arbitration proceeding and specifically including the written settlement agreement of November 5, 1996.

[FOOTNOTE 6 - Cont'd]
entitled to some protection. Oregon Evidence Code, Rule 408 (ORS 40.190) (offers of compromise or settlement not admissible to prove validity or invalidity of a claim or its amount), ORCP 54E (pre-trial offer of settlement by judgment not allowed to be admitted as evidence upon trial), ORCP 36B(3) (documents prepared in preparation for litigation generally not discoverable). These statutory rules reflect the policy long recognized by case law that the public interest in free negotiations for settlement of litigation outweighs any justification for the evidentiary use of such negotiations as admissions of liability or evidence upon a trial, e.g., Dalk v. Lachmund, 157 Or 152, 158, 70 P2d 558 (1939), Zahumensky v. Fanrich, 200 Or 588, 267 P2d 664 (1954). By and large, however, these legal provisions aim to protect the freedom of settlement negotiations occurring prior to an actual settlement; presumably, any settlement agreement which is actually filed in a court would not be privileged from disclosure. Furthermore, these legal provisions do not directly deal with the confidentiality of a government agreement which reflects the final disposition of an employment relation by severance agreement." District Attorney's Public Records Order of August 21, 1989, supra, at pp. 5-6.

[7]E.g., the Court of Appeals in Turner v. Reed, 22 Or App 177, at 180, n. 3: "Since our decision is subject to review by the Oregon Supreme Court, it would be inappropriate for us to disclose the contents of the disputed records. It is, however, exceedingly difficult to write an opinion, or develop a body of case law, that explains the basis of our decision without any mention of the contents of the records." The court proceeded to discuss the general nature of the documents in question.

3. Disciplinary case of Maggie Dorsey, former senior office assistant (ORS 192.501(12)).

In the discipline case of Maggie Dorsey, senior office assistant in the Gresham Police Department, the city has, in fact, already disclosed to petitioner that "Her termination resulted primarily from the misuse of the department's postage machine for personal business and subsequent dishonesty during the course of the investigation." Exemption claim letter of Senior Assistant City Attorney Susan G. Bischoff, dated December 20, 1996, at 2. The labor arbitration sustained the termination for cause. This conduct amounts to theft of public property (or theft of services available only if paid for), apparently aggravated by subsequent lack of candor. It constitutes serious misconduct which was job-related. Therefore, disclosure of the entire corpus of disciplinary and labor arbitration records of this case will be ordered.[8]

4. Disciplinary case of former police officer Richard Riveria (ORS 192.501(12)).

In the case of former police officer Richard Riveria the city likewise has already disclosed to petitioner certain basic facts, namely, "His termination resulted from abuse of workers' compensation leave and dishonesty in the course of the investigation. ***The [labor] arbiter found that Riveria had misused leave benefits and had thereafter lied about the incident." Exemption claim letter of December 20, 1996, supra, at 2. This also amounts to theft of public funds and constitutes serious misconduct. Therefore, we likewise will order disclosure of the entirety of the corpus of records generated by the disciplinary investigation and labor arbitration.[9]

CONCLUSION AND ORDER

From our discussion in Part 1 preceding, it must be apparent that this issue of disclosure of public employee discipline records is a very difficult one respecting which neither the applicable statute nor the scanty existing case law provides this office much clear guidance. There is no way for us to know whether our attempt to promote more specific rational standards and greater consistency by adopting the "guiding principles" of Part 1 accurately gauges the balance between the public's right to know how government business is being conducted and the privacy rights of individual public employees. That balance can only be finally struck by the appellate courts or the Legislative Assembly through new decisions or additional legislation. However, if this office is thought to have erred in ordering or denying disclosure in these or future disciplinary cases, the parties have a clear remedy by injunctive and declaratory action, with review de novo, in the Circuit Court of the state. ORS 192.490. Certainly, this office would welcome any enlightenment which the courts or legislature may provide.

---

[8]We have not considered it necessary to review these records in detail.

[9]See note 8, supra.

Accordingly, it is now ordered that: The petitions of J. Todd Foster for The Oregonian dated November 6, 1996 and December 2, 1996 (as consolidated) are granted; the City of Gresham shall promptly disclose to petitioner all of the records of the disciplinary investigations and labor arbitrations in the cases of Gresham Police Officer James Kalbasky, former police senior office assistant Maggie Dorsey, and former police officer Richard Riveria, subject to payment of the city's fees, if any, not exceeding its actual cost for providing copies of the records in question, consistent with ORS 192.440. (No disclosure is ordered respecting the discipline case of police detective Robert Galbreath, based upon voluntary disclosure by the city which renders the disclosure issue moot).

Very truly yours,

/S/

MICHAEL D. SCHRUNK
District Attorney
Multnomah County, Oregon

MDS:kg

NOTICE TO PUBLIC AGENCY:

Pursuant to ORS 192.450(2), 192.460 and 192.490(3) your agency may become liable to pay petitioner's attorney's fees in any court action arising from this public records petition (regardless whether petitioner prevails on the merits of disclosure in court) if you do not comply with this order and also fail to issue within 7 days formal notice of your intent to initiate court action to contest this order, or fail to file such court action within 7 additional days thereafter.

96-31

[ORS, 1995 Ex. 1]

employment, and may, subject to procedural requirements imposed by law or charter, appropriate money for the payment of amounts agreed upon.

(2) When a judgment is entered or a settlement is made pursuant to subsection (1) of this section, payment therefor may be made in the same manner as payment for tort claims under ORS 30.295. [1979 c.630 §2; 1987 c.396 §1]

30.400 Actions by and against public officers in official capacity. An action may be maintained by or against any public officer in this state in an official character, when, as to such cause of action, the officer does not represent any of the public corporations mentioned in ORS 30.310, for any of the causes specified in such section and ORS 30.320. If judgment is given against the officer in such action, it may be enforced against the officer personally, and the amount thereof shall be allowed to the officer in the official accounts of the officer.

SETTLEMENT OR COMPROMISE BY PUBLIC BODY

30.402 Prohibition of confidential settlements and compromises; exception. (1) No public body, or officer, employee or agent of a public body, who is a defendant in an action under ORS 30.260 to 30.300, or who is a defendant in an action under ORS 294.100, shall enter into any settlement or compromise of the action if the settlement or compromise requires that the terms of the settlement or compromise be confidential.

(2) Notwithstanding subsection (1) of this section, the court may, after an expedited examination in chambers, order that terms and conditions of a settlement or compromise of an action be confidential if the court determines, by written findings, that specific privacy interests of a private individual outweigh the public's interest in the terms of the settlement or compromise.

(3) Any public body, or officer, employee or agent of a public body, who is a defendant in an action under ORS 30.260 to 30.300, or who is a defendant in an action under ORS 294.100, shall file with the court a full and complete disclosure of the terms and conditions of any settlement or compromise of the claims against the public body, its officers, employees or agents. The disclosure shall be filed prior to the dismissal of the action.

(4) For the purposes of this section:

(a) "Action" means a legal proceeding that has been commenced as provided in ORCP 3; and

(b) "Public body" has that meaning given in ORS 30.260. [1991 c. 847 §1]

RECOVERY OF FINES AND FORFEITURES

30.410 In whose name action brought. Fines and forfeitures may be recovered by an action at law in the name of the officer or person to whom they are by law given, or in the name of the officer or person who by law is authorized to prosecute for them.

30.420 Venue of action for forfeiture. Whenever, by law, any property is forfeited to the state, or to any officer for its use, the action for the recovery of such property may be commenced in any county where the defendant may be found, or where such property may be.

30.430 Amount of recovery. When an action is commenced for a penalty, which by law is not to exceed a certain amount, the action may be commenced for that amount, and if judgment is given for the plaintiff, it may be for such amount or less, in the discretion of the court, in proportion to the offense.

30.440 Judgment by collusion not a bar. A recovery of a judgment for a penalty or forfeiture by collusion between the plaintiff and defendant, with intent to save the defendant, wholly or partially, from the consequences contemplated by law, in case where the penalty or forfeiture is given wholly or partly to the person who prosecutes, shall not bar the recovery of the same by another person.

30.450 Disposition of fines and forfeitures. Fines and forfeitures not specially granted or otherwise appropriated by ORS 46.800 (4), 137.017, or other law, when recovered, shall be paid into the treasury of the proper county. [Amended by 1981 s.s. c.3 §110]

Note: The amendments to 30.450 by section 27, chapter 658, Oregon Laws 1995, become operative January 15, 1998. See sections 129 and 150, chapter 658, Oregon Laws 1995. The text that is operative on and after January 15, 1998, is set forth for the user's convenience.

30.450. Fines and forfeitures not specially granted or otherwise appropriated by ORS 137.017, or other law, when recovered, shall be paid into the treasury of the proper county.

30.460 Payment of fines, cost or bail in proceeding to enforce county ordinance or resolution; defendant personally liable. When proceedings are conducted by county hearings officers to enforce requirements or prohibitions of county ordinances or resolutions, if fines, cost or bail are not paid by a defendant within 60 days after payment is ordered, the defendant is personally liable to the county for the amount of the unpaid fines, cost or bail. The county may file and record the order for payment in the County Clerk Lien Record. [1985 c.626 §3]

EXHIBIT 1

Listing of Legislative Records in Oregon State Archives pertaining to:

HOUSE BILL 2222, 1991
(Re. civil procedure)

HOUSE JUDICIARY CIVIL LAW AND JUDICIAL ADMINISTRATION SUBCOMMITTEE MINUTES:

May 9: p. 1 - 2, 5 - 9 (Also on Cassette 97, Side A, 004-245; Cassette 98, Side A, 389-END; Cassette 97, Side B, ALL; Cassette 98, Side B, 000-398)

May 13: p. 2 - 5 (Also on Cassette 101, Side A, 096-END; Cassette 102, Side A, 000-177)

HOUSE JUDICIARY FULL COMMITTEE MINUTES:

May 21: p. 1 - 2 (Also on Cassette 48, Side A, 016-029)

EXHIBIT FILE CONTAINS:

1. EXH F of 5/09: Testimony by Judson Randall. 2 pages.
2. EXH G of 5/09: — V. Salisbury. 1 page.
3. EXH H of 5/09: — Sharon A. Rudnick. 1 page.
4. EXH B1 of 5/13: Proposed Parks amendments submitted by staff. 1 page.
5. EXH B2 of 5/13: Proposed Baum amendments submitted by staff. 1 page.
6. EXH B3 of 5/13: Proposed Edmunson amendment submitted by staff. 2 pages.
7. EXH C of 5/13: Testimony by Ken Jones submitted by staff. 2 pages.
8. EXH A of 5/21: Proposed amendments submitted by staff. 1 page.

SENATE JUDICIARY COMMITTEE MINUTES:

Jun 5: p. 3 - 4 (Also on Cassette 214, Side A, 213-END; Cassette 215, Side A, 000-085)

Jun 10: p. 4 - 5 (Also on Cassette 221, Side A, 052-095)

EXHIBIT FILE CONTAINS:

1. EXH A of 6/05: Testimony by Leonard W. Lanfranco. 1 page.
2. EXH B of 6/05: Proposed amendments submitted by Les Zaitz. 1 page.
3. EXH B of 6/10: Informational hand-out submitted by staff. 1 page.
4. EXH C of 6/10: Proposed amendments submitted by staff. 1 page.
5. EXH D of 6/10: — . 2 pages.

Compiled by: Michael G. McQuade
Reference Archivist
9 December 1993

RECD 7-21-97 17M 17E

EXHIBIT 2